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SYARIKAT GUNUNG SEJAHTERA SDN BHD

v.

LIM SZE ON & ORS

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COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: A-02-256-2002]

C

16 JULY 2007

LAND LAW: *Housing developers - "Housing development", meaning of - Whether appellant a "developer" within meaning of s. 3 Housing Development (Control & Licensing) Act 1966 - Whether terms and*

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conditions in form prescribed in Schedule G in s. 11 Housing Developers (Control & Licensing) Regulations 1989 should apply instead of terms and conditions in agreements entered into between appellant and respondents - Housing Development (Control & Licensing) Act 1966, ss. 3, 5, 6, 18 - Housing Developers (Control & Licensing) Regulations

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1989, regs. 2, 11, Schedule G - National Land Code, ss. 81, 82, Form 5A

CONTRACT: *Housing development contract - "Housing development", meaning of - Whether appellant a "developer" within meaning of s. 3*

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Housing Development (Control & Licensing) Act 1966 - Whether terms and conditions in form prescribed in Schedule G in s. 11 Housing Developers (Control & Licensing) Regulations 1989 should apply instead of terms and conditions in agreements entered into between appellant and respondents - Housing Development (Control & Licensing) Act 1966,

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ss. 3, 5, 6, 18 - Housing Developers (Control & Licensing) Regulations 1989, regs. 2, 11, Schedule G - National Land Code, ss. 81, 82, Form 5A

The respondents, by way of originating summons, sought the following reliefs against the appellant, namely: (i) that the appellant

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was a "developer" within the meaning of s. 3 of the Housing Development (Control & Licensing) Act 1966 ('Act'); and (ii) that the terms and conditions in the form prescribed in Schedule G as provided in reg. 11 of the Housing Developers (Control & Licensing) Regulations 1989 ('Regulations'), *mutatis mutandis*,

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should apply and not the terms and conditions found in the 1st

and 2nd agreements entered into between the appellant and the respondents. The 1st, 3rd, 4th, 6th, 7th, 8th, 9th, 11th and 14th respondents ('respective respondents') were allocated building lots in a scheme known as "Rancangan Perkampungan Tersusun Ampang Baru, Ipoh" in the Mukim of Kinta ('said scheme'). Each of the respective respondents, on varying dates, entered into an agreement with the appellant wherein they agreed to pay the appellant for development works to be carried out by the appellant in the said scheme ('1st agreement'). The appellant then entered into another agreement with all the respondents wherein the appellant was described as the contractor and the respective respondents as the employer ('2nd agreement'). Clause 13 of the 2nd agreement provided that if the appellant (as the contractor) failed to complete and surrender vacant possession by the completion date, the appellant shall pay the 1st and 2nd respondents (as the employer) the sum of RM50 per month as damages calculated from the date when the building should have been completed until the date of actual vacant possession. Things did not go as planned and there was a delay in the completion of the building. The respondents sent the appellant letters of demand and, subsequently, filed the action seeking the aforementioned declarations. The learned High Court judge found for the respondents resulting in the present appeal by the appellant.

Held (allowing the appeal)
Per Mohd Ghazali Yusoff delivering the judgment of the court:

(1) Upon a perusal of ss. 3, 5 and 18 of the Act and regs. 2, 11 and Schedule G of the Regulations, it was apparent that the Act and the Regulations could not apply under the circumstances of this case. The facts showed that it was the respective respondents who applied for the building lots from the Land Office, Ipoh. Letters from the Land Office found in the appeal record showed that the respective respondents were informed that their applications for the building lots were approved subject to certain conditions. The appeal record also showed that a Form 5A as provided for under ss. 81 and 82 of the National Land Code ('Code') was issued to the respective respondents by the Land Office. Consequently, it was also shown in the appeal record that

A the documents of qualified titles (corresponding to the Land Office titles) relating to the building lots were issued to the respective respondents. Therefore, for all intents and purposes, the building lots that were originally State land were alienated to the respective respondents. Thus, it could
B be summarised as follows: (a) when the 1st and 2nd agreements were entered into, the documents of title to the building lots were yet to be issued to the respective respondents; (b) upon the respective respondent's applications, the building lots were alienated to them; (c) the
C respective respondents consequently became the registered owners of the building lots; (d) the appellant was clearly not the proprietor/vendor of the building lots; (e) the respective respondents agreed to pay the costs of the development works carried out by the appellant as per the 1st agreement;
D and (f) the respective respondents also agreed to engage the appellant to construct houses on their respective building lots. (paras 32, 33, 35 & 36)

(2) There was nothing to show that the appellant was a
E "licensed housing developer" within the meaning of s. 3 of the Act. The learned judge had, in granting the declaration that the appellant was a licensed housing developer, erred in law since the court was not empowered to grant such a declaration. Section 5 of the Act provides no housing
F development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under the Act, and such a licence can only be granted by the Controller of Housing ('Controller') as provided for under the Act. There are
G several conditions to be fulfilled before such a licence can be granted, as laid down by s. 6 of the Act. To grant such a declaration would be tantamount to the court usurping the powers of the Controller under the Act. Furthermore, the appellant was also right in its contention that the Act and
H the Regulations could not cover the said scheme *viz*. a "Perkampungan Tersusun", the mechanics of which were different from a "housing development" within the contemplation of the Act. (para 39)

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(3) The basis of the complaint which led the respondents to file this action was that they were not happy with cl. 13 of the 2nd agreement. They wanted damages to be calculated as per cl. 23(2) of the form prescribed in Schedule G of the Regulations and not in the manner provided for under cl. 13 of the 2nd agreement, thus enabling them to be in a position to claim for more damages. (para 38)

(3a) It could not be seen how the terms and conditions found in the sale and purchase agreement in the form prescribed in Schedule G of the Regulations could, *mutatis mutandis*, apply under the circumstances of this case, and not the terms and conditions as found in the 1st and 2nd agreements. The 1st and 2nd agreements clearly could not fit under the Act and the Regulations. The appellant never sold any land in the form of a building lot to any of the respondents. The building lots were formerly State land and, upon application, were alienated to the respective respondents; hence, the issuance of Form 5A under the provisions of the Code. The fact that the appellant, on the facts, held itself out as a "housing developer" in the advertisements and flyers *etc*. had no bearing upon the declarations sought. Under the 2nd agreement, the respective respondents were the landowners. That being the position, the 2nd agreement, even if read together with the 1st agreement, could not in law be replaced by the "statutory agreement" under Schedule G of the Regulations. As such, the learned judge erred in law in also granting the second declaration. To do so would be tantamount to re-writing the 1st and 2nd agreements just for the purpose of entitling the respective respondents to claim more liquidated damages for late delivery to be calculated on a daily basis at the rate of 10% per annum of the costs for construction and not the purchase price, which was clearly not within the ambit of cl. 23(2) of Schedule G of the Regulations. (paras 41 & 42)

Bahasa Malaysia *translation of headnotes*

Responden-responden, melalui saman pemula, telah memohon relif-relif berikut terhadap perayu, iaitu: (i) bahawa perayu adalah seorang "pemaju" menurut maksud s. 3 Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta'); dan (ii) bahawa terma-

terma dan syarat-syarat di dalam borang yang ditetapkan di dalam Jadual G di dalam peruntukan per. 11 Peraturan-Peratuan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan'), *mutatis mutandis*, harus terpakai, dan bukannya terma-terma dan syarat-syarat seperti yang terdapat pada perjanjian-perjanjian pertama dan kedua yang dimeterai di antara perayu dan responden-responden. Responden-responden pertama, ketiga, keempat, keenam, ketujuh, kelapan, kesembilan, kesebelas dan keempat belas ('responden-responden tersebut') telah diberimilik lot-lot bangunan dalam satu skim yang dipanggil "Rancangan Perkampungan Tersusun Ampang Baru, Ipoh" di dalam Mukim Kinta ('skim tersebut'). Setiap responden, pada tarikh-tarikh tertentu, telah memeterai perjanjian dengan perayu di mana mereka bersetuju untuk membayar perayu bagi kerja-kerja pemajuan yang dilaksanakan perayu di skim tersebut ('perjanjian pertama'). Berikutnya, perayu memeterai satu lagi perjanjian dengan semua responden-responden, di mana perayu digambarkan sebagai kontraktor sementara responden-responden tersebut dinyatakan sebagai majikan ('perjanjian kedua'). Fasal 13 perjanjian kedua memperuntukkan bahawa jika perayu (selaku kontraktor) gagal menyiapkan bangunan dan menyerahkan milikan kosong pada tarikh siap, perayu hendaklah membayar kepada responden pertama dan kedua (selaku majikan) sebanyak RM50 sebulan sebagai gantirugi yang dikira dari tarikh bangunan sepatutnya disiapkan sehinggalah penyerahan sebenar milikan kosong. Apa yang berlaku tidak mengikut seperti yang dijadualkan dan akibatnya berlaku kelewatan dalam menyiapkan bangunan. Responden-responden menghantar surat-surat tuntutan kepada perayu, dan selepas itu telah memfail tindakan memohon perisytiharan-perisytiharan di atas. Yang arif hakim Mahkamah Tinggi mendapati untuk responden-responden sekaligus mengakibatkan rayuan perayu di sini.

Diputuskan (membenarkan rayuan)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Melihat kepada ss. 3, 5 dan 18 Akta dan per. 2, 11 serta Jadual G Peraturan, jelas bahawa Akta dan Peraturan tidak terpakai kepada kes di sini. Fakta menunjukkan bahawa yang memohon lot-lot bangunan dari Pejabat Tanah, Ipoh adalah responden-responden tersebut. Surat-surat dari Pejabat Tanah Ipoh seperti yang ada di rekod rayuan menunjukkan

bahawa responden-responden tersebut telah diberitahu bahawa permohonan mereka untuk lot-lot bangunan telah diluluskan tertakluk kepada syarat-syarat tertentu. Rekod rayuan juga menunjukkan bahawa satu Borang 5A seperti yang diperuntukkan ss. 81 dan 82 Kanun Tanah Negara ('Kanun') telah dikeluarkan kepada responden-responden tersebut oleh Pejabat Tanah. Selanjutnya, rekod rayuan menunjukkan bahawa dokumen-dokumen hakmilik bersyarat (bersamaan dengan hakmilik Pejabat Tanah) berkaitan dengan lot-lot bangunan telah dikeluarkan kepada responden-responden tersebut. Oleh itu, untuk semua maksud, lot-lot bangunan yang asalnya merupakan tanah Kerajaan Negeri telah diberimilik kepada responden-responden tersebut. Ringkasan berikut, dengan itu, boleh dibuat, iaitu: (a) apabila perjanjian pertama dan kedua dimeterai, suratan hakmilik kepada lot-lot bangunan masih belum dikeluarkan kepada responden-responden tersebut; (b) atas permohonan responden-responden tersebut, lot-lot bangunan telah diberimilik kepada mereka; (c) responden-responden tersebut dengan itu menjadi pemilik berdaftar lot-lot bangunan; (d) perayu bukan pemilik/penjual lot-lot bangunan; (e) responden-responden tersebut bersetuju untuk membayar kos kerja-kerja pemajuan yang dijalankan perayu menurut terma-terma perjanjian pertama; dan (f) responden-responden tersebut juga bersetuju untuk melantik perayu bagi membina rumah-rumah di atas lot-lot bangunan.

(2) Tidak ada suatu apapun yang dapat menunjukkan bahawa perayu adalah seorang "pemaju perumahan berlesen" mengikut maksud s. 3 Akta. Yang arif hakim, dalam mengisytiharkan perayu sebagai pemaju perumahan, telah khilaf di sisi undang-undang, disebabkan mahkamah tidak diberi kuasa untuk membuat pengisytiharan sedemikian. Seksyen 5 Akta memperuntukkan bahawa tiada pemajuan perumahan harus dimulakan, dilaksana atau dibuat kecuali oleh seorang pemaju yang diberi lesen di bawah Akta, dan lesen sedemikian hanya boleh diberikan oleh Pengawal Peumahan ('Pengawal') selaras dengan peruntukan-peruntukan Akta. Terdapat beberapa syarat yang perlu dipenuhi sebelum lesen berkenaan boleh diberikan. Ini jelas dibentang oleh s. 6 Akta. Oleh itu, membenarkan deklarasi di

sini samalah seperti mahkamah merampas kuasa-kuasa Pengawal di bawah Akta. Selain itu, perayu juga betul dalam hujahnya bahawa Akta dan Peraturan tidak merangkumi skim tersebut, iaitu satu "Perkampungan Tersusun", kerana sifatnya adalah sama sekali berbeza dari sebuah "pemajuan perumahan" seperti yang dimaksudkan oleh Akta.

(3) Asas rungutan yang membawa kepada responden-responden memfailkan tindakan di sini adalah bahawa mereka tidak berpuas hati dengan fasal 13 perjanjian kedua. Mereka mengkehendaki supaya gantirugi dikira mengikut fasal 23(2) borang yang ditetapkan Jadual G Peraturan, bukannya menurut cara yang diperuntukkan di bawah fasal 13 perjanjian kedua, sekaligus membolehkan mereka menuntut gantirugi yang lebih.

(3a) Dalam halkeadaan kes ini, adalah sukar untuk melihat bagaimana terma-terma dan syarat-syarat yang terdapat di dalam perjanjian jual beli di dalam borang Jadual G Peraturan boleh *mutatis mutandis* terpakai, dan bukannya terma-terma dan syarat-syarat seperti yang terkandung di dalam perjanjian pertama dan kedua. Perjanjian pertama dan kedua jelas tidak dirangkumi oleh Akta dan Peraturan. Perayu tidak pernah menjual sebarang tanah dalam bentuk lot bangunan kepada mana-mana responden. Lot-lot bangunan adalah dahulunya tanah Kerajaan Negeri yang diberimilik kepada responden-responden tersebut atas permohonan mereka; ini menjelaskan pengeluaran Borang Form 5A di bawah peruntukan Kanun. Fakta bahawa perayu telah mendedahkan diri mereka sebagai "pemaju perumahan" di dalam iklan-iklan, flyers dan sebagainya tidak ada kaitan dengan deklarasi yang dipohon. Di bawah perjanjian kedua, responden-responden tersebut adalah tuan tanah. Dalam keadaan sedemikian, perjanjian kedua, jikapun dibaca bersama perjanjian pertama, tidak boleh di sisi undang-undang digantikan dengan "perjanjian statutori" di bawah Jadual G Peraturan. Oleh itu, yang arif hakim khilaf di sisi undang-undang apabila mengeluarkan deklarasi kedua. Berbuat demikian samalah seperti menulis semula perjanjian pertama dan kedua semata-mata untuk memberi hak kepada responden-responden tersebut untuk menuntut gantirugi jumlah tertentu yang lebih kerana

kelewatan penyerahan yang dikira atas asas harian pada kadar 10% setahun dari kos pembinaan dan bukannya harga belian, di mana ini jelas tidak dirangkumi oleh fasal cl. 23(2) Jadual G Peraturan.

Case(s) referred to:

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285 ***(dist)***

Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors [2001] 3 CLJ 864 CA ***(refd)***

MK Retnam Holdings Sdn Bhd v. Baghat Singh [1985] 2 MLJ 212 ***(dist)***

SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(dist)***

Legislation referred to:

Housing Development (Control & Licensing) Act 1966, ss. 3, 5, 6, 18

Housing Development (Control & Licensing) Regulations 1989, reg. 2, 11, Schedule G

National Land Code, ss. 81, 82, Form 5A

For the appellant - Choy Kam Lee; M/s KL Choy & Co
For the respondent - Ngeh Koo Ham; M/s Ngeh & Co

[Appeal from High Court, Ipoh; Originating Summons No: 24-652-2000]

Reported by Suresh Nathan

JUDGMENT

Mohd Ghazali Yusoff

[1] The appellant is a locally incorporated company. By originating summons dated 6 July 2000 the 1st to the 14th respondents sought for the following reliefs against the appellant, namely:

(i) a declaration that the appellant is a "Developer" within the meaning of s. 3 of the Housing Development (Control & Licensing) Act 1966 (Act 118) (and hereafter referred to as "the Act"); and

(ii) that the terms and the conditions in the form prescribed in Schedule G as provided in reg. 11 of the Housing Developers (Control & Licensing) Regulations 1989 (hereafter referred to

as "the Regulations"), *mutatis mutandis*, shall apply and not the terms and conditions found in the 1st and 2nd agreements entered into between the appellant and the respondents.

[2] At the end of the day the learned judge in the court below, Abdull Hamid Embong, J (as he then was) granted the declarations sought for. The appellant appealed to this court. We allowed the appeal and set aside all orders made by the learned judge and our reasons for doing so follows.

The Background

[3] The 1st, 3rd, 4th, 6th, 7th, 8th, 9th, 11th and 14th respondents (hereafter referred to as "the respective respondents") were allocated building lots in a scheme known as "Rancangan Perkampungan Tersusun Ampang Baru, Ipoh" in the Mukim of Kinta (hereafter referred to as "the said scheme"). Consequently each of the respective respondents, on varying dates, entered into an agreement with the appellant wherein they agreed to pay the appellant for development works to be carried out by the appellant in the said scheme (hereafter referred to as "the 1st agreement").

The 1st Agreement

[4] In the 1st agreement the appellant was described therein as the first party and the respective respondents as the second party. The preamble to the 1st agreement states, *inter alia*, the following:

(a) by an agreement dated 8 April 1995 entered into between a company named Saga Lintang Sdn Bhd (hereafter referred to as "SLSB") and the appellant, SLSB assigned the offer, granted by the District and Land Office, Ipoh to SLSB to carry out development works for a scheme known as "Rancangan Perkampungan Tersusun" over Lots No. 12606 and 65612 in the Mukim of Ulu Kinta, District of Kinta, Perak (hereafter referred to as "the said land"), to the appellant;

(b) SLSB thereby gave power to the appellant to carry out the development works as per letter of offer dated 4 April 1995 issued by the District and Land Office, Ipoh;

(c) the appellant has the expertise to carry out the development works for a "Perkampungan Tersusun"; A

(d) the appellant, at its own cost and expense, had obtained approval from the relevant authority for the subdivision of the said land into building lots; the titles to the building lots have yet to be issued by the relevant authority; B

(e) the respective respondents were selected by the "Jawatankuasa Pemilih Pejabat Daerah & Tanah Ipoh" to partake in the said "Rancangan Perkampungan Tersusun"; C

(f) the appellant has agreed to carry out the development works, which is to prepare the basic infrastructure on the said land, that is, piping for water supply, electric sub-station, "semi grouted" roads and concrete drains; D

(g) the respective respondents have been allocated an empty building lot (as identified in the agreement) measuring 3,600 square feet with the condition that they will make payment to the appellant for the development works and comply with the terms and conditions as stated in this agreement. E

[5] Amongst the terms and conditions of the 1st agreement were the following:

(a) the appellant agrees to carry out the development works and the respective respondents agree to pay the costs of these works as stated in the Second Schedule to the agreement, namely, the sum of RM28,000 to be paid in four monthly instalments of RM7,000 including the land premium for the building lots payable to the District and Land Office, Ipoh; F G

(b) the respective respondents agree to make the payments as per the above schedule;

(c) upon the completion of the above payments the appellant, at its own cost and expense and as soon as possible, will obtain the document of title to the building lot allotted (cl. 3); H

(d) the respective respondents agree to appoint the appellant to construct a house on the building lot subject to agreement that will be entered into between them in relation to the cost, schedule of payment and house-plan agreeable to both parties (cl. 9). I

A **The 2nd Agreement**

[6] Subsequently the appellant entered into another agreement with all the respondents, ie, the 2nd agreement wherein the appellant was described therein as the contractor and the
B respective respondents as the employer.

[7] It would be appropriate at this stage to mention that the 3rd, 6th, 7th and 8th respondents as employer executed these agreements individually whilst the 1st and 2nd respondents, the 4th and 5th respondents, the 9th and 10th respondents, the 11th
C and 12th respondents and the 13th and 14th respondents were joint signatories to these agreements as employer. This would denote that on the whole, nine (9) 2nd agreements were executed.

D **[8]** For ease of reference, we would only refer to the 2nd agreement executed by the 1st and 2nd respondents on 9 July 1996. The preamble to the 2nd agreement states, *inter alia*, the following:

E (a) the 1st and 2nd respondents are the registered owners of the building lot;

(b) the 1st and 2nd respondents are desirous of constructing a house on the building lot in accordance with the plan
F approved by the relevant authority at the price as stated in the first schedule to this agreement, namely, RM75,000;

(c) upon execution of this agreement the 1st and 2nd respondents will apply for a loan from, *inter alia*, a financial institution for the above purpose and make the scheduled payments as per
G the second schedule to this agreement;

(d) the period for the completion of the house shall be 2 years from the date of execution of this agreement (in this agreement it would be 8 September 1998).

H **[9]** Clause 13 of the 2nd agreement provides that if the appellant (as contractor) fail to complete and surrender vacant possession by the completion date, the appellant shall pay the 1st and 2nd respondents (as employer) the sum of RM50 per month
I as damages calculated from the date when the building should have been completed until date of actual vacant possession.

[10] Things did not go on as planned and there was a delay in the completion of the building. Consequently by letter dated 30 May 2000, Messrs Ngeh & Co, solicitors for the 1st and 2nd respondents (who were also the solicitors for the other respondents) wrote a letter of demand to the appellant. The letter of demand, *inter alia*, reads:

> We have been instructed by our client that pursuant to your newspaper advertisements as the developer of the abovestated housing project, our client has purchased the above said property from you. Subsequently, our client discovered that the documents that they have signed were in fact two (2) separate Agreements, one for the Sale and Purchase of Land dated 12/5/96 and the other for the Construction of a single storey bungalow on the said land, dated 9/7/96, although our clients claim that both the agreements were executed by them on the 12/5/96.
>
> We have been further instructed by our client that you have in fact constructed more than four (4) units of housing accommodations and therefore you are a "developer" within Section 3 of the Housing Developer (Control & Licensing) Act, 1966 (hereinafter referred to as "the Act").
>
> As such the Agreement that governs the sale and purchase of the abovesaid property should be Schedule G of the Housing Developers (Control & Licensing) Regulations, 1989 (hereinafter referred to as "the Regulations").
>
> According to Clause 20(1) of Schedule G, the time period for the completion of the abovesaid property should be within 24 months from the date of signing of the Sale and Purchase Agreement.
>
> Our client informed us that as of today you have delayed in handing over vacant possession of the said property for 749 DAYS and you are therefore liable to pay our client statutory liquidated damages amounting to RM21,136.17. The late delivery damages is still continuing.
>
> ...
>
> Our client thereby seeks from you, which we hereby do, the followings *(sic)*:
>
> 1. whether you are agreeable that the governing Sale and Purchase Agreement should be Schedule G of the Regulations; and

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2. if the above is answered in the affirmative, that you are liable to pay our client statutory liquidated damages in the sum of RM12,1755.07 (sic) for late delivery of vacant possession of the abovesaid property to our client and other damages suffered as a consequence of the said breach.

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TAKE NOTICE that if (1) is answered in the negative, we shall apply to the Court for a Declaration to that effect.

ALSO TAKE NOTICE that the penalties for contravention of any of the provisions of the said Regulations, as prescribed in Regulation 13(1) of the said Regulations, are that you SHALL BE LIABLE on conviction to a fine up to RM5,000-00 or to a term of imprisonment up to 3 years or to BOTH.

C

TAKE FURTHER NOTICE that if the said sum of RM21,136.17 is not paid to our client or to us as our client's solicitor and vacant possession of the abovesaid property delivered to our client within SEVEN (7) days from date hereof, we have our client's strict instructions to institute legal proceedings against you for recovery of vacant possession of the abovesaid premises together with costs, damages and interests without any further reference to you.

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[11] Similar letters of demand for the 3rd to the 14th respondents were also sent to the appellant. As mentioned earlier, the respondents filed this action on 6 July 2000.

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Judgment Of The High Court

[12] In his grounds of judgment, the learned judge summarised the facts of the case as follows:

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The defendant through advertisements in the newspapers, brochures and flyers and an advertisement board that it put up, had advertised itself as a housing developer of one housing project called Desa Sri Ampang Ipoh (the Project). All 14 plaintiffs are the purchasers of the houses built by the defendant in the Project. The Project was publicly announced through usual advertisements and the defendant advertised itself as the "Pemaju Perumahan" (see Exbt LSOT - Encl. 2). The defendant had also advertised itself as a housing developer in respect of another housing project, which advertisement was coupled with an advertisement on the development of the Project, wherein it was stated that all houses in phases 1, 2 & 3 had been sold and bookings are now called for Phase 4 of the Project (see Exbt LSO-2T in Encl. 2). The

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said Project consisted of 168 residential houses. The plaintiffs as purchasers entered into separate agreements (the first agreement)with the defendant in 1996 and one on 5.3.1997 (for the 13th and 14th plaintiffs). Subsequent to the signing of this first agreement, the plaintiffs were required to sign another agreement with the defendant (second agreement). Under the second agreement the purchasers (plaintiffs) were termed as Majikan (employer) and the defendant as the contractor. This peculiar arrangement as it turned out was necessary because the defendant had been given this land ie Lots 12606 and 65612, Mukim Ulu Kinta, by the State Authority to develop it as a "Rancangan Kampung Tersusun".

Under the second agreement the defendant had agreed to complete the building of the house within 2 years from the date the second agreement was entered into. Clause 13 of that agreement however stipulates that in the event of any delay to complete and hand over vacant possession of the house, the defendant need only to pay to the plaintiffs damages of RM50 per month calculated from date of completion to the date of actual delivery of vacant possession. There was no dispute that there had been late delivery of the houses purchased by the plaintiffs. The issue that arose was whether the agreements entered into by both parties were in contravention of Act 118, and that the damages on late delivery should be made subject to S.20 (2) of the Regulations which provides that liquidate damages in that instance is to be calculated on a daily basis at the rate of 10% per annum of the purchase price.

[13] Before the learned judge, learned counsel for the respondents argued that the appellant was estopped from denying that they are actually the developer to the said scheme. He also argued that since the development consisted of building more than four houses, then by virtue of s. 3 of the Act, the appellant is a housing developer.

[14] The preamble to the Act reads "An Act to provide for the control and licensing of the business of housing development in West Malaysia and for matters connected therewith". Section 3 of the Act, which is an interpretation provision, *inter alia*, provides:

"housing accommodation" includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises but does not include an accommodation erected on any land designated for or approved for commercial development;

A "housing developer" means any person, body of persons, company, firm or society (by whatever name described), who or which engages in or carried on or undertakes or causes to be undertaken a housing development;

B "housing development" means to develop or construct or cause to be constructed in any manner more than four units of housing accommodation and includes the collection of monies or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or the sale of more than four units of housing lots by the landowner or C his nominee with the view of constructing more than four units of housing accommodation by the said landowner or his nominee;.

[15] Counsel argued that by virtue of s. 3 of the Act, the appellant can only be termed as a housing developer and hence was bound by the provisions of the Act and could not contract D out of it. Thus, the need for the declarations sought by the respondents.

[16] In opposition to the reliefs sought for by the respondents, learned counsel for the appellant argued that by signing the 1st E agreement, the respective respondents agreed that the said scheme was a "Rancangan Perkampungan Tersusun". Consequently, under the 2nd agreement, the respondents had employed the appellant to be their contractor to build their houses. He then pointed out that the respective respondents are actually the landowners and F had applied for their respective building lots. The appellant as contractor had merely carried out the infrastructure works. In relation to the advertisements in the newspapers and flyers, etc., counsel for the appellant argued that that was only an invitation to the public and that a housing developer's licence was not G required for the said scheme since the development concept was different. In short, it was the appellant's stand that the said scheme did not come within the scope of the Act and they were under no obligation to comply with the provisions of the Act.

H **[17]** The learned judge was of the view that the contention of the appellant as discussed above cannot hold water for the following reasons:

I

(i) the fact that the appellant had advertised itself as the housing developer to the said scheme clearly showed that the houses were developed by the appellant and were up for sale;

(ii) the appellant was not merely a contractor who did the development works on the said land but was a housing developer by legal definition and had built more than 168 units of houses in the said scheme;

(iii) it may well be that this is a State approved "Rancangan Perkampungan Tersusun" but the acts and conduct of the appellant showed that it had undertaken the said scheme as a housing developer and hence was subjected to the statutory requirements; and

(iv) the 1st and 2nd agreements were entered into before the purported applications for building lots and premium payments were made; the building lots were registered in the names of the respondents after they had purchased the same from the appellant and after their respective agreements were entered into.

[18] In relation to cl. 13 of the 2nd agreement, the learned judge said:

> The offensive Clause 13 in the second agreement is in my view clearly intended to contract out of the defendant's obligation under the Regulations and thus defeat the objects underlying the statute which is legislated with a view of protecting house purchasers. The situation is not dissimilar to that found in the case of *Sea Housing Corporation S.B. v. Lee Poh Choo* [1982] 2 MLJ 31 where the Federal Court held:
>
> > (1) It is clear that only terms and conditions designed to comply with the requirements of the Housing Developers (Control and Licensing) Rules, 1970, may be inserted in the contract of sale of land that is governed by the Housing Developers (Control and Licensing) Act, 1966 and the Rules, and that the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted;
> >
> > (2) Clause 32 of the agreement being inconsistent with Rule 12 of the Rules and not designed to comply with the requirements of the rules is void;.

In *MK Retnam Holdings S.B. v. Bhagat Singh* [1985] 2 MLJ 211, the Supreme Court also held that a second agreement entered into by a housing developer and a purchaser in which it purported to extend the completion date by a further six months after the lapse of the statutory time-limit, was in violation of the letter and spirit of the Housing Developers (Control and Licensing) Rules 1970, and therefore should not be allowed to stand.

Finally, the remarks of Mohamed Azmi FCJ in *Koperasi Serbaguna Ceupacs Tanggungan Bhd v. City Investment S.B.* [1984] 1 CLJ 250 may aptly be quoted here on the purport of Act 118, when he said:

> the protection afforded by law to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or renounced in advance by an individual purchaser.

In the premises, it is my finding that this Project undertaken by the defendant is one caught by Act 118. The agreements entered into by the parties should have been made according to the standard Sale and Purchase Agreement pursuant to Schedule G of the Regulations and any departure or modification therefrom can only be made with a prior written approval of the Controller of Housing (see r. 11(3) of the Regulations). This Court will not recognise the bargaining away or renouncement of a purchaser's right and an agreement to that effect must be held to be void on public policy grounds. As such, clause 13 found in the second agreement must not be allowed to stand and the plaintiffs are entitled to pursue their claims for liquidated damages for the late delivery of their houses under the formula provided by the Regulations.

For these reasons the reliefs sought by the plaintiffs are allowed with costs.

The Appeal

The Appellant's Case

[19] Before us, counsel for the appellant submitted that the only issue to be determined is whether the appellant was caught by the Act and the Regulations. He then summarised the facts of the case to be as follows:

(a) the appellant was an assignee of an award by the District and Land Office, Ipoh to SLSB to carry out construction work for the said scheme;

(b) the respective respondents were selected by the "Jawatankuasa Pemilih Pejabat Daerah & Tanah Ipoh" to join and to apply for a building lot in the said scheme;

(c) the appellant was responsible to carry out the development works in the said scheme;

(d) upon payment of premium and other fees to the District and Land Office, Ipoh the respective respondents were entitled to building lots in the said scheme;

(e) two separate agreements were entered into, *viz.*, the 1st and 2nd agreements.

[20] Counsel then referred to reg. 11(1) of the Regulations which read:

> Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereof shall be in the form prescribed in Schedule G ... .

[21] Counsel argued that the facts of this case showed the said scheme was a "Perkampungan Tersususun Scheme" and there was never any sale of the said land or the building lots. Instead, it was an alienation of land by the State government, the land in question being State land. In relation to this he pointed out that the form prescribed in Schedule G of the Regulations contemplates a contract of sale and purchase "of a housing accommodation together with the subdivisional portion of land appurtenant". Further the proprietor/vendor must be the registered and beneficial owner of land held under an identified title. In the instant case the appellant was neither the landowner nor the vendor of the said land.

[22] As such, counsel contended that the Act does not apply to the appellant as it was not a housing developer within the contemplation of the Act. He pointed out that the appellant was only a contractor and it is the respective respondents who are the registered owners of the building lots. Further, neither the 1st agreement nor the 2nd agreement talk about a sale of land.

A **The Respondents' Case**

[23] In opposition to the appeal, learned counsel for the respondents submitted that the issues which need to be determined is whether the appellant is a housing developer under the provisions of the Act and whether the appellant is allowed to contract out of the Act. Counsel pointed out that the respondents were purchasers of houses in the said scheme and each of them were required to sign two separate agreements, *viz.*, the 1st and 2nd agreements. The 1st agreement states that the appellant was assigned the right to develop a "Perkampungan Tersusun" and the respective respondents, as purchasers, were described therein as being one of the successful applicants who has been allocated a building lot in the said scheme while the 2nd agreement states the respective respondents, as landowners, employ the appellant as contractor to construct a house on their respective building lots.

[24] Counsel then pointed out that the respondents, as purchasers, deny having applied for any building lot in the said scheme. The purported applications for the building lots were all dated subsequent to the dates of the 1st agreements and the applications for the building lots and its premium and other payments were in fact made by the appellant and not by the respondents as purchasers.

[25] In conclusion, counsel for the respondents submitted that:

(i) the appellant is estopped from denying that it was a housing developer;

(ii) the appellant was in fact and by definition of law a housing developer;

(iii) the appellant is bound by the provisions of the Act and the Regulations; and

(iv) the terms and conditions of the 1st and 2nd agreements shall be in the form prescribed in Schedule G as provided for under reg. 11 of the Regulations.

Judgment Of This Court

[26] The main issue in this appeal is whether the appellant is a "housing developer" within the contemplation of the Act. In the advertisements and flyers, etc., referred to earlier, the appellant held out that it was the "housing developer" for the said scheme.

[27] Pursuant to s. 3 of the Act a "housing developer" means "any ... company ... which engages in or carried on or undertakes or causes to be undertaken a housing development". Section 3 of the Act also provides that a "licensed housing developer" means "any housing developer licensed under s. 5 to engage in or carry on or undertake a housing development and includes the holder of any power of attorney of such housing developer duly created under the Powers of Attorney Act 1949".

[28] Section 5 of the Act intituled "Prohibition against housing development except by virtue of a licence and provisions relating to the grant of a licence" read:

> 5. (1) No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.
>
> (2) Except with the written consent of the Controller no housing developer other than a licensed housing developer shall assume or use in relation to his business or any part of his business the words "housing developer" or any of its derivatives or any other word or words indicating the carrying on of the business of housing development.
>
> (3) A housing developer who desires to engage in or carry out or undertake or cause to be undertaken a housing development shall apply to the Controller for a licence and any such application shall be made in the prescribed form and in the case of any applicant listed in column (1) of the Schedule the application shall be accompanied by the documents listed against him in column (2), every such document being verified by means of a statutory declaration made by the person listed in column (3) of the said Schedule.
>
> (4) ...
>
> (4A) ...
>
> (4B) ...
>
> (5) ... .

[29] Section 18 of the Act intituled "Offences relating to a licence under s. 5" read:

A 18. Any housing developer who:

(a) in contravention of section 5(1) engages in, carried out, or undertakes housing development without having been duly licensed under that section;

B (b) in contravention of section 5(2) assumes or uses in relation to his business or any part of his business the words "housing developer" or any of the derivatives or any other word or words indicating the carrying on of the business of housing development; or

C (c) fails to comply with any of the conditions imposed on the licence granted under section 5,

shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than fifty thousand ringgit but which shall not exceed five hundred thousand ringgit or to D imprisonment for a term not exceeding five years or to both.

[30] Regulation 2 of the Regulations, an interpretation provision, provides "contract of sale" means "the Sale and Purchase Agreement prescribed under reg. 11". Regulation 11(1) read:

E (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the F form prescribed in Schedule H.

[31] It would be appropriate here to reproduce part of the form prescribed in Schedule G of the Regulations which is as follows:

G SCHEDULE G

HOUSING DEVELOPERS (CONTROL AND LICENSING) ACT 1966

HOUSING DEVELOPERS (CONTROL AND LICENSING) REGULATIONS 1989
H (Regulation 11(1))

SALE AND PURCHASE AGREEMENT (LAND AND BUILDING)

I

AN AGREEMENT made this ... day of ... 19 ... BETWEEN ... a company incorporated in Malaysia and duly licenced under the Housing Developers (Control and Licensing) Act 1966 (Licence No. ...) with its registered office at ... (hereinafter called "the Vendor") of the *one/first part AND ... NRIC No. ... of ... (hereinafter called "the Purchaser") of the *other/second part AND ... NRIC No ... of ... (hereinafter called "the Proprietor") of the third part.

Preamble.

*WHEREAS the *Proprieter/Vendor is the registered and beneficial owner of land* held under ... (description of title) and No of Title ... *Lot No/LO No ... Section ... in the *Town/Village/Mukim ... District of ... State of ... in area measuring approximately ... hectares ... square metres (hereinafter referred to as "the said Land")* and *has granted the Vendor the absolute right to develop the said Land as a housing development and to sell the said Land;*

*AND WHEREAS the Proprietor hereby agrees to the sale of the said Land for the purpose of this Agreement;

AND WHEREAS the said Land is charged to ... with its registered office at ... as security for the loan granted to the Vendor;

AND WHEREAS the Vendor has, at its own costs and expense, obtained the approval of the Appropriate Authority for the subdivision of the said Land into building lots in accordance with the approved Layout Plan a copy of which is annexed as the First Schedule (hereinafter referred to as "the Layout Plan") and separate documents of title have *since been/not yet been issued by the Appropriate Authority;

AND WHEREAS the Vendor has, at its own cost and expense, obtained the approval of the building plans (hereinafter referred to as "the Building Plan") from the Appropriate Authority, a copy of which is annexed as the Second Schedule;

AND WHEREAS the Vendor is developing the said Land as a housing development known as ... *Phase ... (Advertisement and Sale Permit No. ...);

AND WHEREAS the Vendor has agreed to sell and the Purchaser has agreed to purchase all that piece of land with vacant possession distinguished as *Plot/Lot No. ... and which is more particularly delineated and shaded RED in the Layout Plan measuring approximately ... square metres in area (hereinafter referred to as

A "the said Lot" TOGETHER with a ... to be erected thereon (hereinafter referred to as "the said Building") described in the Vendor's plan as Type ... specified in the Second Schedule hereto, (and the said Lot and Building are hereinafter collectively referred to as "the said Property"), subject to the terms and conditions
B hereinafter contained;

NOW IT IS HEREBY AGREED as follows:

Property free from agricultural, industrial and building restrictions

C 1. *The Vendor hereby agrees to sell and the Purchaser agrees to purchase the said Property free from any agricultural or industrial conditions expressed or implied and any restrictions against the building of housing accommodation thereon* and all encumbrances other than those imposed by the provisions hereto/already subsisting at the date hereof (if any) and any conditions expressed or implied affecting
D the title.

Property free from encumbrances before the Purchaser takes vacant possession of the said Building

E 2. (1) The *Proprietor and the Vendor shall not immediately and at any time after the date of execution of this Agreement subject the said Land to any encumbrances without the prior approval of the Purchaser and the *Proprietor and the Vendor hereby undertakes that the said Property shall be free from encumbrances immediately prior to the Purchaser taking vacant possession of the said Building.

F

(2) The Purchaser shall grant such approval to the *Proprietor and the Vendor encumbering the said Land for the purpose of obtaining credit facilities from any bank and/or financial institution only if the Purchaser has first received confirmation in writing
G from the relevant bank and/or financial institution disclaiming their rights and interests over the said Property and undertaking to exclude the said Property from any foreclosure proceedings which such bank and/or financial institution may take against the *Proprietor and Vendor and/or the said Land.

H (3) In the event the said Land shall be encumbered to any bank and/or financial institution by the Vendor, the Vendor shall deliver or cause to be delivered to the Purchaser and/or the Financier a copy of the redemption statement and undertaking letter issued by such bank and/or financial institution in respect of the said Lot and shall authorise the Purchaser to pay such portion
I of the purchase price or the Financier to release such portion of

the Loan, as the case may be, equivalent to the amount of the redemption sum payable in respect of the said Lot directly to such bank and/ or financial institution and thereafter the balance purchase price or the balance Loan to the Vendor provided all such payments and releases are made progressively at the time and in the manner prescribed in the Third Schedule hereto.

Purchase price

3. The purchase price of the said Property is ringgit (RM ...) only and shall be payable in the manner hereinafter provided.

Schedule of payments

4. (1) *The purchase price shall be paid by the Purchaser to the Vendor by instalments and at the time and in the manner as prescribed in the Third Schedule hereto.* The Vendor is not bound to commence or complete the works in the order referred to in Third Schedule and the Purchaser shall pay the instalments according to the stage of works completed by the Vendor provided that any damage to the completed works by subsequent stage of works shall be repaired and made good by the Vendor at its own cost and expense before the Purchaser takes vacant possession of the said Building.

(2) Every notice referred to in the Third Schedule requesting for payment shall be supported by a certificate signed by the Vendor's architect or engineer in charge of the housing development and every such certificate so signed shall be proof of the fact that the works therein referred to have been completed.

... . (emphasis added)

[32] From our reading of the provisions of law referred to above we were of the view that the Act and Regulations cannot apply under the circumstances of this case. The facts showed that it was the respective respondents who applied for the building lots from the Land Office, Ipoh. Letters from the Land Office, Ipoh found in the appeal record showed that the respective respondents were informed that their applications for the building lots were approved subject to certain conditions. For ease of reference we would refer to the letter from the Land Office, Ipoh which was addressed to the 4th respondent; it read:

Permohonan Tanah Untuk Tapak Rumah
Dalam Mukim Ulu Kinta PT...
RPT. Ampang

Adalah dengan segala hormatnya berhubung dengan perkara di atas, memaklumkan bahawa permohonan tuan/puan telah diluluskan mengikut syarat-syarat dan perjanjian seperti berikut:

(a) Jenis Milik	–	Pajakan Mukim
(b) Tempoh Pajakan	–	99 tahun
(c) Premium	–	RM600.00
(d) Hasil Tahun Pertama	–	RM120.00
(e) Bayaran Ukur	–	
(f) Batu Sempadan	–	
(g) Deraf	–	RM5.00
(h) Bayaran Memperenggan	–	RM150.00
(i) Hakmilik Sementara dan Tetap	–	RM80.00
Kos Pembangunan		

(j) Syarat-syarat tertentu

(i) Pemilik hendaklah di dalam tempuh (2) tahun daripada tarikh pengeluaran milik mendirikan sebuah bangunan mengikut pelan yang diluluskan oleh Majlis Bandaraya dan hendaklah selepas itu menjaganya di dalam keadaan baik yang dapat memuaskan hati Pentadbir Tanah Kinta, Ipoh.

(ii) Pemilik akan membayar dan bertanggungjawab di atas segala cukai assessmen dan sebarang apa bayaran yang lain yang mungkin atau mesti dibayar atau dikenakan ke atasnya atau berkenaan tanah yang dengan ini diberimilik atau yang mungkin atau sebarang bahagian atau yang mungkin atau yang mesti dibayar atau dikenakan ke atasnya atau berkenaan sebarang bangunan yang ada pada masa ini didirikan di atas tanah itu samada dikenakan oleh sebuah Majlis Bandaraya, Majlis Bandaran, Lembaga Bandaran, Majlis Daerah atau sebarang penguasa lain yang sah di sisi Undang-Undang.

(l) Sekatan Milik – Tanah yang dengan ini diberimilik oleh dibenarkan ditukar milik atau dipajak kecil atau dibebankan melainkan kepada orang atau orang-orang yang diberi kebenaran bertulis oleh Menteri Besar.

(m) Jenis Bangunan – Bangunan

2. Sekiranya tuan/puan bersetuju dengan syarat-syarat perjanjian di atas, tuan/puan adalah dijemput ke Pejabat Tanah, Ipoh pada ... jam 9.00 pagi untuk menerima Notis Genap Masa Hasil Dibayar (Borang 5A).

Kesemua pembayaran adalah berjumlah RM955.00 (Sembilan Ratus Lima Puloh Sahaja).

3. Kegagalan tuan/puan hadir pada tarikh yang ditetapkan akan mengakibatkan pembatalan tanah yang diluluskan.

[33] The appeal record also showed that a Form 5A as provided for under ss. 81 and 82 of the National Land Code 1965 was issued to the respective respondents by the Land Office. Sections 81 and 82 provides as follows:

81. Items of land revenue payable on approval

(1) The following sums shall become due to the State Authority at the time when it approves the alienation of any land under this Act:

(a) the first year's rent payable in respect of the land, computed on the basis of the area approved, or provisionally approved, for alienation;

(b) the premium (if any) so payable, computed on the like basis;

(c) the amount, or estimated amount, of any survey fees chargeable in respect of the land where the land is to be surveyed by a Survey Officer; and

(d) the fees chargeable in connection with the preparation and registration of documents of qualified title and final documents of title thereto.

(2) As soon as may be after any sums have become due in respect of any land by virtue of subsection (1), the Land Administrator shall, by notice in Form 5A, require the intended proprietor to pay them to him within the time

specified in that behalf in the notice; and if any such sum is not so paid within the specified time, the approval of the State Authority to the alienation thereupon lapse.

(3) So far as any of the sums specified in subsection (1) are at the commencement of this Act outstanding in respect of any land approved for alienation under the provisions of any previous land law, the provisions of this section shall apply thereto as if the land had been approved for alienated immediately after that commencement:

Provided that no fee chargeable in connection with the preparation and registration of documents of qualified title shall be payable if the approval of the State Authority was given under the provisions of a previous land law to a person who, pursuant to the approval, was at the commencement of this Act lawfully in occupation of the land in expectation of title.

(4) For the purposes of this section, the provisions of subsections (1) and/ (2) of section 96 shall apply to the computation of rent.

82. Power to require payment of deposit

(1) The State Authority may if it thinks fit direct that no application for the alienation of land under this Act, or no application for the alienation thereunder of land of any class or description specified in the direction, shall be entertained unless and until there has been paid to the Land Administrator, by way of deposit, an amount estimated by him as the total amount which will become due to the State Authority by virtue of subsection (1) of section 81 if the application is approved.

(2) On receiving any application to which any such direction applies, the Land Administrator shall, by notice in Form 5A, require the applicant to deposit the said amount within the time specified time in that behalf in the notice; and if the amount demanded is not so deposited within the specified time, the application shall thereupon be deemed to have been withdrawn.

[34] For ease of reference we would refer to the notice in Form 5A from the Land Office, Ipoh to the 4th respondent; it read:

Tuan/Puan adalah dengan dikehendaki dalam tempoh tiga(3) bulan dari tarikh notis ini disampaikan supaya * membayar/memasukkan dalam deposit di Pejabat Tanah Daerah ini wang-wang yang berikut:

Cukai bagi tahun yang pertama	RM 120.00
Premium	RM 600.00
Bayaran Ukur (tidak termasuk Tanda Sempadan)	RM
Tanda Sempadan	RM
Penyediaan dan pendaftaran Suratan Hamilik Tetap dan Sementara	RM 80.00
Jumlah	RM 800.00

Adalah diberi notis bahawa jika jumlah wang tersebut di atas tidak dibayar/dimasukkan dalam deposit dengan sepenuhnya dalam tempoh yang dinyatakan itu, maka menurut kuasa peruntukan-peruntukan Seksyen *81/82 Kanun Tanah Negara

* Kelulusan atau permohonan tuan/puan akan luput.

* Permohonan tuan/puan akan disifatkan sebagai telah di tarik balik.

[35] Consequently the appeal record also showed that document of qualified titles (corresponding to Land Office titles) relating to the building lots were issued to the respective respondents.

[36] The facts discussed above would denote that for all intents and purposes, the building lots which were originally State land were alienated to the respective respondents. Thus, it can be summarised as follows:

(a) when the 1st and 2nd agreements were entered into documents of title to the building lots were yet to be issued to the respective respondents; this was clear from the fourth preamble to the 1st agreement;

(b) upon the respective respondents' applications, the building lots were alienated to them;

(c) the respective respondents consequently became the registered owners of the building lots;

A (d) the appellant was clearly not the proprietor/vendor of the building lots;

(e) the respective respondents agreed to pay the costs of the development works carried out by the appellant as per the 1st
B agreement;

(f) the respective respondents also agreed to engage the appellant to construct houses on their respective building lots; we would reiterate here that the 2nd, 5th, 10th, 12th and 13th respondents were parties to the 2nd agreements executed by
C the respective respondents notwithstanding they are not joint registered owners of the building lots.

[37] It is not disputed that the appellant was employed by the respondents to construct houses on the respective respondents'
D building lots in accordance with the 2nd agreement. It was a term of the 2nd agreement that the period of completion of the houses shall be 2 years from the date of the execution of the agreement. It is not disputed that there was a delay in the completion of the houses. In relation to this, cl. 13 of the 2nd agreement, as
E discussed earlier, stipulates that in the event of any delay to complete and hand over vacant possession, the appellant need only to pay damages of RM50 per month calculated from the date of completion to the date of actual delivery of vacant possession.

F **[38]** From our reading, the basis of the complain which led the respondents to file this action was that they were not happy with the said cl. 13 of the 2nd agreement. We were of the view that they want damages to be calculated as per cl. 23(2) of the form prescribed in Schedule G of the Regulations and not in the
G manner provided for under cl. 13 of the 2nd agreement and when the declarations sought for were granted by the court below, they would now be in a position claim for more damages, *viz.*, upon it being declared that the terms and conditions in the form prescribed in Schedule G as provided in reg. 11 of the Regulations
H shall apply in place of the 1st and 2nd agreements, cl. 23(2) of the form prescribed in Schedule G as opposed to cl. 13 of the 2nd agreement would apply. Clause 23 of the said form prescribed in Schedule G of the Regulations is as follows:

I

Time for delivery of vacant possession

23. (1) Vacant possession of the said Building shall be delivered to the Purchaser in the manner stipulated in clause 24 herein within twenty-four (24) calendar months from the date of this Agreement.

(2) If the Vendor fails to deliver vacant possession of the said Building in the manner stipulated in clause 24 herein within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Building. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Building.

(4) For the purpose of claiming any liquidated damages in the Tribunal of Homebuyer Claims established under section 16B of the Housing Development (Control and Licensing) Act 1966 [Act 118], such claim shall be made not later than twelve (12) months from:

(a) the date of issuance of the certificate of fitness for occupation for the said Building; or

(b) the expiry date of the defects liability period as set out in clause 26. (emphasis added)

[39] There is nothing to show that the appellant was a "licenced housing developer" within the meaning of s. 3 of the Act. The learned judge has granted the declaration that the appellant is such. We do not think that the court is empowered to grant such a declaration. Section 5 of the Act provides no housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under the Act. Such a licence can only be granted by the Controller of Housing as provided for under the Act and not by way of a declaration by the court. There are several conditions to be fulfilled before such a licence can be

granted and s. 6 of the Act lay down the conditions or restrictions for the grant of such a licence. These conditions must be fulfilled before such a licence can be issued. To grant such a declaration would be tantamount to the court usurping the powers of the Controller of Housing under the Act. It is our view that the learned judge erred in law in granting such a declaration. We would also agree with the contention of the appellant that the Act and the Regulations cannot cover the said scheme, *viz.*, a "Perkampungan Tersusun" the mechanics of which are different from a "housing development" within the contemplation of the Act.

[40] We would explain our views a bit further. The form prescribed in Schedule G of the Regulations specifically refer to a sale and purchase agreement in relation to land and building. The first, second and seventh paragraphs to the preamble in the form prescribed in Schedule G of the Regulations denotes the following:

(a) the proprietor/vendor is the registered and beneficial owner of the land (held under an identified title) and has granted the vendor the absolute right to develop the land as a housing development and to sell the said land;

(b) the proprietor agrees to the sale of the land for the purposes of this agreement;

(c) the vendor is developing the said land as a housing development known as ... (phase no., advertisment and sale permit no.);

(d) the vendor has agreed to sell and the purchaser has agreed to purchase the said land together with a house to be erected thereon.

[41] We cannot see how the terms and conditions found in the sale and purchase agreement in the form prescribed in Schedule G of the Regulations can, *mutatis mutandis*, apply under the circumstances of this case and not the terms and conditions as found in the 1st and 2nd agreements. The 1st and 2nd agreements clearly cannot fit under the Act and the Regulations. The appellant never sold any land in the form of a building lot to any of the respondents. These building lots were formerly State

land and upon application were alienated to the respective respondents. Hence the issuance of Form 5A under the provisions of the National Land Code. The fact that the appellant held itself out as a "housing developer" in the advertisements and flyers, etc., has no bearing upon the declarations sought for. In *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors* [2001] 3 CLJ 864, in delivering the judgment of this court, Gopal Sri Ram JCA summarised the matter of advertisements in this way (at p. 868):

> ... as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers.

[42] Under the 2nd agreement, the respective respondents are the landowners. That being the position, we cannot see how the 2nd agreement, even if read together with the 1st agreement, can in law be replaced by the "statutory agreement" under Schedule G of the Regulations. As such, we find that the learned judge erred in law in also granting the second declaration sought for. To do so would be tantamount to re-writing the 1st and 2nd agreements just for the purpose of entitling the respective respondents to claim for more liquidated damages for late delivery to be calculated on a daily basis at the rate of 10% per annum of the costs for construction and not the purchase price which is clearly not within the ambit of cl. 23(2) of Schedule G of the Regulations.

[43] In his grounds of decison, the learned judge referred to *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 and *MK Retnam Holdings Sdn Bhd v. Baghat Singh* [1985] 2 MLJ 212. We cannot see the relevance of these authorities in relation to the facts in the instant appeal.

[44] In *SEA Housing Corporation Sdn Bhd* the plaintiff wanted to buy a shophouse in phase 5 in SEA Park, Petaling Jaya, from the defendant who was a licensed developer. It was common ground that the transaction between the plaintiff and the defendant was to be governed by the Act and the Housing Developers (Control and Licensing) Rules 1970 ("the Rules"). There was late delivery of approximately two years. It was a term of the sale and purchase agreement that the defendant should pay liquidated damages at the rate of 8% per annum on the purchase price for

any delay in the completion of the said building up to the date of actual completion and delivery of possession. The defendant opposed the claim for liquidated damages for late delivery on the grounds that it was excused from liability by cl. 32 of the sale and purchase agreement which reads:

> The vendor shall not be liable to purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed, hindered or prevented by force majeure including but not limited to acts of God strikes lockouts riots civil commotion acts of war or the disability of contractors and subcontractors employed by the vendor either commencing, carrying on or completing their work or failure to obtain any necessary sanction or approval of any local authority or any other circumstances of whatsoever nature beyond the control of the vendor.

It was the defendant's contention that the delay, if any, was caused by circumstances beyond their control including acute shortage of contractors, sub-contractors, skilled and semi-skilled labour and construction workers during part of the relevant stage of the construction and also general shortage of building materials, particularly cement. The court did not agree that it was open to the defendant to escape liability by inserting the said cl. 32 in the agreement and, *inter alia*, held that only terms and conditions designed to comply with the requirements of the Rules that may be inserted in a contract of sale of land that is governed by the Act and the Rules, and that on the contrary terms and conditions which purport to get round the Act and the Rules so as to remove the protection of home buyers may not be so inserted.

[45] In *MK Retnam Holdings Sdn Bhd* the appellant, a housing developer, has appealed against the decision of the learned Judge in granting, *inter alia*, an order for statutory indemnity awarded under the Housing Developers (Control and Licensing) Rules, 1970 ("the Rules"). The facts were that the respondent booked a house with the appellant and accordingly both parties executed a sale and purchase agreement over the house. The house was to be completed within 18 months from the date of the signing of the agreement but the house was never completed by the due date. Subsequently, a second agreement called the "supplementary agreement" was entered into by the parties which provided that the house should be completed within six months from the date of the signing of this second agreement and that the purchase

price of the house to be increased by RM3,585. However the house was again not completed by the new due date and delivery and vacant possession was never made to the respondent. The court held, *inter alia*, that the second agreement was clearly in violation in of the letter and spirit of the Rules. On delivering the decision of the Supreme Court on this issue, Hashim Yeop A Sani SCJ (as he then was) said (at p. 213):

> But it would seem to us that the validity of the second agreement should be tested in the light of the Housing Developers (Control and Licensing) Rules 1970. We are of the view that the second agreement is a clear example of "contracting out" of the provisions of the 1970 Rules. The primary object of that legislation is to protect the weak against the strong. See also *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31.
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> ...
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> Finally it is also not disputed that no attempts were made by the developer to get approval for extension of time from the Controller of Housing under Rule 12(2) of the 1970 Rules. In fact no such application was ever made until after the writ was filed on March 28, 1983 and by that time even the second agreement had lapsed for more than a year. The second agreement is therefore clearly in violation of the letter and spirit of the Housing Developers (Control and Licensing) Rules, 1970. It is clearly an agreement whose admitted aim it was to defeat the objects of a statute and therefore should not be allowed to stand.

[46] We are of the view that the two authorities cited have no bearing upon the instant appeal. It was not disputed in the two authorities that the Act and the Rules were applicable. In both cases, there was a sale and purchase agreement of land and building and the vendor was the owner of the land as well as a licenced housing developer within the contemplation of the Act as opposed to the instant case wherein the appellant was neither the owner of the building lots nor a licenced housing developer and further, the 1st and 2nd agreements were not sale and purchase agreements of land and building.

[47] In his grounds of decision the learned judge also referred to *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285. Again, the facts of that case can be clearly distinguished, as in the earlier two authorities referred to, from the facts in the instant appeal. In *City Investment Sdn Bhd* the

A appellant was the registered owner of the land in question and had entered into two separate contracts with the respondents, a co-operative society of civil servants, for the sale of a small portion of the land to be developed. By the first contract the appellants agreed to sell to the respondents 60 specified buildings lots for the B price of $5,000 for each lot and to clear and level the lots for a development price of $420,000 calculated at the rate of $7,000 per lot. The appellant also agreed to nominate a licenced housing developer who would build a terrace house on each lot in conformity with the plans and specifications annexed to the first C contract for the construction price of $840,000 calculated at the rate of $14,000 for each house. The appellant later nominated themselves as the licensed housing developer for the first contract and submitted draft buildings contracts which was rejected by the respondents as it did not conform with the provisions of the Act D and the rules made thereunder. The facts also showed that the appellant have been issued with a licence over the whole of the said land which in the Federal Court's finding when dealing with the appeal from the High Court, that it must include the property sold which only formed a small part of the whole area.

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[48] The learned trial judge in *City Investment Sdn Bhd* held that the first contract was a sale of land with houses and therefore caught by the Act and the rules made thereunder. The appellant's appeal to the Federal Court and subsequently to the Privy F Council was dismissed. It was held by the Board that by the first contract and by the appellant's own nomination of themselves as developers, the appellants became engaged in the business of housing development by agreeing to construct more than four units of housing accommodation in one development with the view of G selling the housing accommodation thus constructed. It was also held that the appellant were and remain the proprietors of the land until they transfer the building lots and that under the first contract and the nomination, the appellant became the housing developer under a contract to construct and sell 60 terrace H houses to the respondents for the construction price.

[49] The facts in the instant appeal are clearly different, *viz*., there were no sale and purchase agreements for the sale of the building lots even if the 1st and 2nd agreements are read together as the appellant was neither the vendor nor the registered owner I

of the building lots or even the said land at the outset neither was SLSB also the vendor or the registered owner of the said land prior to the assignment of the development works to the appellant. The Acts and the Regulations surely are not applicable under the circumstances of this instant appeal.

[50] As such, it was our unanimous decision that this appeal be allowed with costs here and below and that the orders of the learned judge be set aside. We had also ordered the deposit to be refunded to the appellant.